Supreme Court, U.S.
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No. 99-1745

In The

Supreme Court of the United States

AMERICAN AIRLINES, INC.,

Petitioner,

v.

THE UNITED STATES DEPARTMENT OF TRANSPORTATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF AMICUS CURIAE THE CITY OF GREENWOOD VILLAGE COLORADO IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The City of Greenwood Village is a home-rule city incorporated in 1950 pursuant to the Colorado Constitution, Art. 20, §1, and C.R.S. §31-1-201. Greenwood Village is located in Arapahoe County, Colorado, one of the four counties comprising the metropolitan area of Denver, Colorado. Development in Greenwood Village consists primarily of office park buildings, commercial shopping areas, schools, and residences. Greenwood Village has approximately 12,000 residents but more than 40,000 persons work in Greenwood Village and commute into and out of Greenwood Village each weekday. Many of the city's 12,000 residents live within an area described as the Airport Influence Area encompassing an estimated 25 square miles in both Arapahoe and adjacent Douglas Counties.

Greenwood Village essentially borders Centennial Airport, a general aviation reliever airport, owned by Arapahoe County and operated by the Arapahoe County Public Airport Authority ("ACPAA") in the southeastern area of metropolitan Denver. In 1966, Centennial Airport was originally planned and approved as a general aviation reliever facility to Stapleton Airport, the area's only scheduled passenger service airport. *Arapahoe County Public Airport Authority ("ACPAA") v. Centennial Express Airlines, Inc.*, 956 P.2d 587, 589 (Colo. 1998). For the last 12

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[1] The City of Greenwood Village has secured the consent of all of the parties to this proceeding in the Court of Appeals and the letters of consent are attached to this brief. No party has authored any part of this brief. Greenwood Village has paid for the legal fees and costs associated with the filing of this brief.

years, there has been continued pressure to convert Centennial Airport to a scheduled passenger service facility in direct competition with the Denver area's sole passenger airport, Denver International Airport. *Id.*

Greenwood Village's property tax base depends in large part on the property values which would drop significantly if Centennial Airport were to become a passenger airport with related noise and traffic congestion from passengers and airline workers. Greenwood Village has actively participated in public hearings and litigation to maintain the airport's status as a reliever airport and to protect the city's interests in its zoning and the surface transportation management agreements with Arapahoe County.

Greenwood Village intervened in the FAA enforcement proceeding against the ACPAA, *Centennial Express Airlines, Inc. v. ACPAA*, DOT Docket No. 16-98-05, and in the petition for review now pending before the Tenth Circuit Court of Appeals. *ACPAA v. FAA*, No. 99-9508 (March 10, 1999 10th Cir.). Like this case, the *ACPAA* case concerns whether an airport's proprietary powers allow it to exclude a certain class of operations. Fort Worth sought to limit passenger service at Love Field to protect the regional airport. ACPAA determined that passenger operations and scheduled passenger service were inconsistent with the original purposes of Centennial Airport. *ACPAA v. Centennial Express*, 956 P.2d at 591. In both cases, DOT contends that federal law requires a public airport to accept all classes and types of aviation service and that airports have no power to take into account other factors, like the status of the facilities, regional

transportation decisions, or the impacts on the adjacent communities.

Greenwood Village has a unique perspective and supports the decisions made by these airport proprietors to restrict air service at particular airports. Greenwood Village, also like the communities near Love Field, relied on decisions made by the airport and promises to the residents that these airport would remain limited service facilities. Greenwood Village believes that airport's proprietary rights and powers entitle airport proprietors to make reasonable decisions allocating air service among various regional airports.

STATEMENT OF THE CASE

Greenwood Village adopts the Statement of the Case in the Petition for a Writ of *Certiorari* filed by American Airlines.

SUMMARY OF ARGUMENT

1. While the Airline Deregulation Act ("ADA") preempts state and local government regulation "relating to" aviation rates, routes and services, 49 U.S.C. §41713(b)(1), it also preserves the authority of a local governmental entity operating an airport to exercise its proprietary powers and rights. *Id.* at §41713(b)(3). The case law seeking to define the line between airport and federal regulation demonstrates that there are as many different outcomes as there are airports in the country.

The contradictions create substantial confusion and inconsistency in an important area of commerce affecting thousands of communities.

2. This Court should accept the petition for a writ of *certiorari*, because communities, like the City of Greenwood Village, need to be able to rely on regional transportation decisions in order to fulfill their respective zoning and traffic management functions. If an aviation facility can be compelled to operate contrary to regional transportation plans and decisions, then communities face significant land use and environmental problems, with limited tools to address these problems after the fact. Litigation by communities seeking to limit the adverse impacts of airports demonstrates that this is a national and widespread problem affecting fundamental division of authority and power between a federal agency and duly authorized local government entities.

ARGUMENT

I. SCOPE OF FEDERAL PREEMPTION UNDER THE ADA UNRESOLVED

This case concerns whether the ADA, 49 U.S.C. §41713(b), preempts the authority of local government entities which own and operate airports to exercise their proprietary rights and powers to engage in land use and transportation planning and to allocate aviation services among the region's respective airports. The Court of Appeals for the Fifth Circuit held that the City of Dallas cannot limit scheduled passenger service at Dallas' close-in Love Field Airport even though the limits were

included in the terms of the original agreement between Dallas and Fort Worth to build and manage the Dallas-Fort Worth Airport. *American Airlines, Inc. v. Dept. of Transportation,* 202 F.3d 788 (5th Cir. 2000).

Since enactment of the ADA, the federal and state courts have attempted to address the scope and extent of federal preemption and the correlative scope of the airport and local government authority. Despite the well-established rules of federal preemption, the application of these rules to the aviation laws and management of airports has led to widely disparate decisions. Both federal and state court decisions reflect the confusion and contradiction in applying the ADA and other federal aviation laws.

A. ADA's Provisions

The ADA provides that no state or political subdivision may "enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation." 49 U.S.C. §41713(b)(1). This subsection was enacted in 1978 to "ensure that the states would not undo federal deregulation with regulation of their own." *Manning v. Skywest Airlines,* 949 F. Supp. 767, 768 (C.D. Cal. 1996); *see also Hodges v. Delta Airlines, Inc.,* 4 F.3d 350, 353 (5th Cir. 1993).

The ADA's express preemption provision is qualified by the next subsection called the proprietary powers exception, which states: "This subsection does not limit . . . a political subdivision of a State . . . that owns or operates an airport served by an air carrier holding a

certificate issued by the Secretary of Transportation from carrying out its proprietary powers and rights." 49 U.S.C. §41713(b)(3).

B. Preemption Principles

Under the Supremacy Clause, U.S. CONST., Art. VI, cl.2, preemption may be either express or implied "and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Gade v. National Solid Wastes Management Assn.*, 505 U.S. 88, 98 (1992). This Court recognizes three classes of preemption: express, conflict and field. *Id.* If Congress declares an area to be governed by federal law, then preemption is express. *New York Tel. Co. v. New York State Dept. of Labor*, 440 U.S. 519, 560 (1979). Conflict preemption occurs when state law conflicts with federal law, and the Supremacy Clause requires that federal law controls. *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 220 (1995) (federal law precludes state regulation but permits contractual enforcement). Field preemption arises when the federal regulatory scheme is so pervasive that there is no room for state regulation. *Hillsborough v. Automated Medical Labs.*, 471 U.S. 707, 713 (1985).

This Court has held that when Congress uses specific language of preemption, as it has done in the ADA, the doctrine of implied preemption may not apply. *Cipollone v. Liggett Group*, 505 U.S. 504, 516 (1992); *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438, 1444 n. 13 (10th Cir. 1993) (applying *Cipollone* analysis to find no implied preemption in tort action concerning adequacy of rear shoulder

harness). Certainly, the ADA carves out express preemption as to rates, routes, and services, §41713(b)(1), while simultaneously reserving the proprietary rights and powers to the airport operator, §41713(b)(3). Thus, the holding in *Cipollone* suggests that any preemption must be limited that which relates to rates, routes, and services and a finding of preemption must be weighed against the reasonable exercise of proprietary powers.

II. REGULATORY ACTIVITIES PREEMPTED BY §41713(b)(1)

The Fifth Circuit construed §41713(b)(3) as being limited to the exercise of power to reduce noise, congestion, or pollution, when the statute itself does not contain these limitations. *American Airlines, Inc. v. Dept. of Transportation*, 200 F.3d at 806. The Fifth Circuit dismissed as unpersuasive the Colorado Supreme Court decision in *ACPAA v. Centennial Express Airlines, Inc.*, 956 P.2d at 591, 595, while conceding that the courts have not defined the scope of authority as a proprietor and there is no uniform rule. *Id.* at 807.

As the Colorado Supreme Court and other decisions demonstrate there is significant debate and inconsistent decisions interpreting the breadth of §41713(b)(1) and (3). Nevertheless, the discussion below shows that the legal question finds widely varying results and certainly this Court's guidance is needed.

A. Defining "Related To"

In interpreting §41713(b)(1), this Court has broadly construed the "related to" phrase to include direct and indirect effects on rates, routes or services and has determined that the preemption provision displaces all state laws that fall within its sphere, even including those that are consistent with the federal law's substantive requirements. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383-387 (1992); *see also American Airlines, Inc. v. Wolens*, 513 U.S. at 224. In focusing on whether the state law merely had a "connection with or reference" to airlines rates, routes, or services, the Court emphasized that Congress did not intend to "hobble competition for airline passengers through the application of restrictive state laws." However, neither *Morales* or *Wolens* concerned the proprietary rights exception to preemption in §41713(b)(3).

B. The Proprietary Powers Exception and Its Limits

1. Rationale for Proprietor Exception

The proprietor exception reflects the fact that airport proprietors must exercise powers and authorities not governed by federal law, including the purchase and lease of land, construction, maintenance, and rehabilitation of aviation facilities, and the hiring and firing of employees, to name just a few such functions. *Air Transportation Assn. v. Crotti*, 389 F. Supp. 58, 61 (N.D. Calif. 1975); *City of Cleveland v. City of Brook Park*, 893 F. Supp. 742, 746 (N.D. Ohio 1995). The proprietor exception also

preserves the airport's common law liability, including that for noise damages. This Court held in *Griggs v. Allegheny County*, 369 U.S. 84, 89 (1961), that an airport proprietor was the party responsible for noise damage caused by aircraft using the airport.

In *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973), this Court distinguished between cities attempting to limit noise from airports and airports imposing their own rules. The Court set aside Burbank's noise controls because it did not own the airport. "We do not consider here what limits, if any, apply to a municipality as a proprietor . . . 'Airport owners acting as proprietors can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory.' " *Id.* at 637 n. 14, *quoting* an opinion letter from the Secretary of Transportation.

The ADA's proprietor exception reflects these earlier principles and any attempt by the federal government to "regulate noise directly at local airports would jeopardize federal immunity from liability for noise damage." P. Dempsey, *Aviation Law*, p. 8-25 (1992). Since a municipal proprietor is accountable for damages caused by excessive noise, the airport may exercise some measure of control over such noise. *Alaska Airlines, Inc. v. City of Long Beach*, 951 F.2d 977, 982 (9th Cir. 1991).

Other courts have interpreted the proprietary powers exception as reserving only a "limited role" for local airport proprietors in regulating noise levels at their airports. *City and County of San Francisco v. FAA*, 942 F.2d 1391, 1394 (9th Cir. 1991); *Santa Monica Airport Assn. v.*

City of Santa Monica, 659 F.2d 100, 104 (9th Cir. 1981) ("Congress intended that municipal proprietors enact reasonable regulations to establish acceptable noise levels for airfields and their environs").

There is general agreement that state and local governments who do not own an airport (non-proprietors) cannot regulate aviation services or noise impacts. *See e.g. City of Burbank v. Lockheed Air Terminal*, 411 U.S. at 637; *State of Minnesota v. Metropolitan Airports Commission*, 520 N.W.2d 388, 391 (Minn. 1994). However, if the airport proprietor is involved in the permitting process, then a city, as opposed to the port authority which actually operates the airport, may adopt noise and other restrictions. *National Helicopter Corp. of Am. v. City of New York*, 137 F.3d 81, 88 (2d Cir. 1998) (affirming authority of city, which also owns the airport, to regulate helicopter operations under both its police powers and proprietary powers).[2]

2. Land Use and Airport Operations

The Fifth Circuit incorrectly concluded that the proprietary rights exception is limited to noise, traffic congestion and pollution. *American Airlines*, 200 F.3d at 807.

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[2] The Second Circuit does not try to resolve the apparent conflicts with an earlier holding that noise restrictions were limited to local airport noise. *See British Airways Bd. v. Port Authority of New York*, 558 F.2d 75, 84 (2d Cir. 1977) (a local airport proprietor is "vested only with the power to promulgate reasonable, nonarbitrary and non-discriminatory regulations that establish acceptable noise levels for the airport and its immediate environs").

Certainly, the statute itself does not define or limit the proprietary powers and rights of airport owners. §41713(b)(3). Moreover, the federal courts have also recognized that the federal aviation laws do not address ownership and operation of public airports. *Communities, Inc. v. Busey*, 956 F.2d 619, 621 (6th Cir. 1992). Instead, land use decisions have traditionally been the prerogative of state and local governments and are not addressed in the federal aviation laws. Cities may also adopt land use restrictions which may affect the operation of an airport. *Dallas/Fort Worth Intl. Airport Bd. v. City of Irving*, 854 S.W.2d 161 (Tex. App. 1993), *judgment vacated without ref. to merits*, 868 S.W.2d 750 (Tex. 1993) (*per curiam*); *City of Cleveland v. City of Brook Park*, 893 F. Supp. at 746.

The Airports and Airways Improvement Act ("AAIA"), codified at 49 U.S.C. §§47101, *et seq.*, only authorizes FAA to work with local land use jurisdictions to avoid incompatible zoning. While DOT is charged to maintain the safe operation of the airports, §47101(a)(1), DOT must do so by cooperating with state and local officials. §47101(g)(1). The literature concerning airport policy attribute the lack of airport capacity to the fact that land use and airport ownership and maintenance are left in the hands of state and local governments. *See e.g.* L. L. Creswell, *Airport Policy in the U.S.: The Need for Accountability, Planning and Leadership*, 19 TRANSP. L. J. 1, 8 (1990).

3. Use Restrictions Related to Safety and Traffic

In *Western Air Lines, Inc. v. Port Authority of New York and New Jersey*, 658 F. Supp. 952 (S.D. N.Y. 1986), *aff'd* 817

F.2d 222 (2d Cir.), *cert. denied*, 485 U.S. 1006 (1987), the court upheld a perimeter rule at LaGuardia Airport which prohibited airlines from using the airport to run nonstop flights beyond a set distance. *Id.* at 953. The stated purpose of the rule was to reduce ground congestion and maintain LaGuardia as a short and medium haul airport by diverting longer haul air traffic to other airports. *Id.* In holding that the proprietary powers exception applied, the court noted that the issue had often arisen in the context of noise regulations but held that the exception "does not expressly limit proprietary powers to the regulation of noise, although presumably Congress would have so limited the section if that is what it had in mind." *Id.* at 957. The court added, "A proprietor's interest in regulating ground congestion at its airports would appear to be at the core of the proprietor's function as airport manager, perhaps even more so than the regulation of noise." *Id.*

In *Midway Airlines v. County of Westchester*, 584 F. Supp. 436 (S.D. N.Y. 1984), an airline sought an injunction requiring the county to provide immediate access to the airport. Due to increased traffic at the airport, the county had postponed ruling on all new applications to operate at the airport pending a review of policies with respect to airport operations, for safety reasons. *Id.* at 438. In analyzing the proprietary powers exception, the court stated, "The legislative history is unmistakably clear that Congress did not intend that the preemptive force of [§41713(b)(1)] would interfere with 'long recognized powers of the airport operators to deal with noise and *other environmental problems* at the local level.' " *Id.* at 440 n. 18, *quoting* 124 Cong. Rec. 37419 (1978)(remarks of Sen.

Kennedy)(emphasis added). In fact, in response to the language in the *British Airways* cases, which appear to limit a proprietor's powers to noise control, the court added that a local airport operator can "issue non-discriminatory rules defining the permissible level of noise *or other danger* which can be created by an aircraft using the airport." *Id.* at 441. The court upheld the temporary ban, noting that the county was acting responsibly in seeking to protect the safety of passengers and others who use the facility at the airport. *Id.*

More recently, the Second Circuit held that the proprietor exception cannot be limited strictly to regulations dealing with noise. *National Helicopter Corp.*, 137 F.3d at 88. Instead, the municipal owner of an airport is uniquely situated to address such concerns as ground congestion, and must therefore be granted some leeway, under the proprietor exception, in this area. *Id.*

C. Proprietary Powers Delineated By State Law

Some courts focus on the statutory delegation of authority in analyzing a local proprietor's rights and powers. In *Montauk-Caribbean Airways, Inc. v. Hope*, 784 F.2d 91 (2d Cir. 1986), the court found that seasonal restrictions imposed on a year-round fixed based air carrier operator were indeed a valid exercise of the municipality's proprietary rights. *Id.* at 97. In defining the scope of the proprietary powers exception, the court looked to the express statutory delegation of authority that created the governing airport body and found that there was broad authority to deny year-long operating rights. *Id.* at 96. *See also Sea Air Shuttle v. Virgin Islands Port Authority,*

800 F. Supp. 293, 305 (D. Virgin Is. 1992)(in holding that the local Port Authority acted within the proprietary powers exception in the award of an exclusive seaplane ramp agreement, the court also looked to the statutory delegation of authority in analyzing the Port Authority's specific proprietary powers and rights).

The Fifth Circuit failed to address the Texas Municipal Airports Act ("TMAA") which provides broad authority to municipal airport owners. Instead the Fifth Circuit carefully distinguished or declined to follow the number of decisions affirming the use of proprietary powers. *American Airlines,* 202 F.3d at 807. The concession that there are contrary outcomes supports the petition for the writ of *certiorari.*

III. FEDERAL EFFORTS TO DOMINATE AIRPORT MANAGEMENT ADVERSELY AFFECTS COMMUNITIES

Communities like Greenwood Village are directly and immediately affected by the conflicts between DOT and an airport's definition of its powers. Greenwood Village participates as a member of the Denver Regional Council of Governments ("DRCOG") which is charged with coordinating transportation planning decisions among 47 city and county governments in the Denver metropolitan area. *ACPAA v. Centennial Express Airlines, Inc.,* 956 P.2d at 589. DRCOG seeks to coordinate local government transportation decisions, such as road improvements, traffic routing, and airports to promote the best use of public resources. Both Arapahoe County and Greenwood Village have been members of DRCOG,

and supported the regional aviation system plans allocating air service among the metropolitan area's several airports. *Id.*

Greenwood Village relied on the allocation of air service in preparing its comprehensive plan and making zoning decisions which approved location of residential development and construction of schools. Greenwood Village needs reasonable certainty regarding both the location and purpose of transportation facilities, and needs to be able to rely on those decisions in making their own governmental decisions. Certainly, the communities around Love Field also made decisions relying upon the allocation of air traffic in the metropolitan area. These relationships are relatively fixed and should not be disrupted decades later based on expansive principles of federal preemption.

The testimony developed in the *ACPAA v. FAA* proceeding demonstrated the significant local community impacts if local transportation decisions can be upset by a federal agency decades later. In the Centennial Airport matter, Centennial Express proposed to begin offering scheduled passenger service at the general aviation airport. His 1993 proposal, which is still on file with the ACPAA, would have had 119 flights a week with up to 630,000 passengers a year (assuming a 75% load factor) and more than 36,000 operations a year. Centennial Airport's operational capacity is 525,000 operations a year and in 1998 it had about 468,000 operations. In light of Centennial Airport's 1998 operations, the Centennial Express operations would bring Centennial Airport to 95 percent of its capacity. Moreover, because there are no other carriers, the 630,000 passengers a year would drive

to and from Centennial Airport using roads in Arapahoe County and Greenwood Village.

Fire and emergency rescue, surface roads, and parking are all issues over which DOT has no jurisdiction and yet are directly related to any decision to allow various types of aviation services at a particular airport. When a metropolitan area, like Dallas-Fort Worth or Denver already has a major regional passenger airport, it is reasonable for the airport proprietors to try to address regional transportation issues to accommodate surface and air transportation in a way which makes sense for the entire community. This is the reasonable scope and intent of the proprietary powers exception and without review, the problems faced by communities will continue to be unresolved.

The examples of the problems communities face when dealing with the location and effects of airports are numerous. The communities near Love Field adopted land use and zoning restrictions to prevent the airport from growing. *Dallas/Fort Worth Intl. Airport Bd. v. City of Irving Texas,* 854 S.W. 2d at 168. The Texas courts permitted land use ordinances designed to limit expansion of Love Field. *See also City of Burbank v. Burbank Glendale-Pasadena Airport Auth.,* 72 Cal. App. 4th 366, 85 Cal. Rptr. 2d 28 (Cal. App. 1999). However, the federal courts are generally unsympathetic to non-proprietor ordinances or efforts to enforce land use and environmental laws. *State of Minnesota v. Metropolitan Airports Commission,* 520 N.W.2d at 391; *City of Bridgeton v. City of St. Louis,* 2000 WL 364878 (Mo. App. E.D. 2000) Slip op. at 5.

IV. CONCLUSION

This case meets the Court's standard for a writ of *certiorari*. There are numerous conflicting decisions applying in theory the same law to similar situations with differing outcomes. This confusion is not only difficult for proprietor airports but it is equally difficult for the communities located near the airports. For these reasons, the City of Greenwood Village respectfully urges this Court to grant the writ.

Respectfully submitted,

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